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FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
LCI Petition for Declaratory Ruling)
Concerning Bell Operating Company)
Entry into In-Region Long Distance Markets)

CC Docket No. 98-5

To: The Commission

COMMENTS OF CABLE & WIRELESS, INC.

Cable & Wireless, Inc. ("CWI"), by its attorneys, hereby submits these comments in support of the above-captioned Petition filed by LCI International Telecom Corp. ("LCI").¹ CWI believes that the declaratory relief requested by LCI in its Petition, if adopted as discussed below, will encourage local competition and accelerate BOC interLATA entry consistent with Section 271 of the Telecommunications Act of 1996.

I. INTRODUCTION

It is now more than two years since Congress passed the Telecommunications Act of 1996. Yet one of its primary goals, to allow competitive local exchange carriers ("CLECs") to quickly begin offering residential consumers competing local telecommunications service using components of Bell Operating Company ("BOC") monopoly local network facilities and functions, has not even begun to be fully realized. And despite their many applications to obtain

¹ See Public Notice, Commission Seeks Comment on LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets, DA 98-130 (rel. Jan. 26, 1998). The Commission extended the comment period to March 23, 1998, in response to a request filed by the Competitive Telecommunications Association and the National Association of State Utility Consumer Advocates. Order, CC Docket No. 98-5, DA 98-339 (rel. Feb. 20, 1998).

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interLATA authority under Section 271 of the Telecommunications Act, no BOC has been able to show that they have opened up their monopoly networks to competitors in a fully meaningful way. The CLECs and BOCs are deadlocked: The CLECs are not able to secure satisfactorily priced and nondiscriminatory agreements to obtain BOC local network elements to compete with the BOCs in the local market and the BOCs cannot overcome the regulatory hurdle imposed by Section 271 to begin providing interLATA service to customers in their operating region until they satisfy the statutory criteria. The LCI Petition promises to break this deadlock by proposing a voluntary “Fast Track” option for BOC InterLATA entry which would complement the provisions of Section 271 of the Act.

CWI supports the Fast Track option as a way to help break the current deadlock and facilitate development of local competition in conjunction with Section 271. The Fast Track provides the BOCs with an expedited option for obtaining interLATA entry authority by adopting a rebuttable presumption that a BOC is in compliance with the entry criteria of Section 271 if it voluntarily restructures its current operations into a separate wholesale network subsidiary (“NetCo”) and retail service subsidiary (“ServeCo”). This approach is premised on the notions that separating wholesale network operations into NetCo will reduce the BOCs’ incentive to engage in anticompetitive conduct inherent in integrated wholesale-retail operation and that requiring NetCo to deal on an arm’s length, nondiscriminatory basis with ServeCo retail operations will help make transparent BOC attempts to engage in anticompetitive cost-shifting between wholesale and retail operations. NetCo would make wholesale network elements and functions available to other CLECs on the same basis as ServeCo. Thus, CWI believes that this Fast Track restructuring will benefit the CLECs’ ability to obtain the necessary components of BOC networks to build competitive local networks. The rebuttable presumption that a BOC

volunteering to implement Fast Track is in compliance with Section 271 also will benefit the BOCs by accelerating their interLATA entry.

II. SUBSTANTIAL LOCAL COMPETITION IS STILL BEING UNDERMINED BY BOC BARRIERS TO COMPETITION

Local competition continues to be hampered by BOC refusals to make their network facilities and services available to competitors in an effective manner or on a nondiscriminatory basis. As identified in LCI's Petition, BOCs are discriminating against CLECs to prevent competition in at least three areas: (i) operations support systems ("OSS");² (ii) availability of unbundled network elements ("UNE"); and (iii) pricing.

Nondiscriminatory access to OSS is essential to allow CLECs to compete with the BOCs. The Commission ordered the BOCs to establish equivalent OSS by January 1, 1997,³ but 14 months later no BOC has complied with OSS requirements. The BOCs continue to provide CLECs with poor quality OSS that is often inferior to the level of OSS provisioned to themselves. CLECs typically receive from the BOCs slow, manual OSS operations, spotty and unreliable service and inefficient staffing. This disparity in the quality of OSS provisioned to support CLEC networks fundamentally handicaps the ability of CLECs to provide even basic retail local service by depriving CLECs of the same level of OSS functionality available to BOC retail operations.

Unbundled network elements ("UNE") are not available to CLECs either, even

² OSS incorporates all of the systems, databases, information and process commonly used to support the ordering, provisioning, testing and maintenance of network elements and services. *Local Competition Order*, 11 FCC Rcd at 15499, 15767; 47 C.F.R. § 51.319.

³ *Local Competition Order*, 11 FCC Rcd at 15764, 15766 ¶ 525; *see also Second Order on Reconsideration*, 11 FCC Rcd 19738, 19742-44 ¶ 9.

though Congress explicitly recognized that new carriers will not be able to duplicate incumbent LEC networks at any time in the foreseeable future without them. BOCs have refused to provide UNEs in easy to use combinations. *See, e.g.* LCI Petition at 7-8. Even where BOCs have contracted to combine UNEs upon CLEC request, they are reneging on those deals, or including additional conditions, such as requiring the CLEC to collocate in every central office where they seek to combine network elements. *Id.* By withholding meaningful access to usable UNE combinations, the BOCs are raising their rivals' costs and staving off CLEC attempts to broadly develop competing local networks.

Moreover, as LCI points out, BOCs also are not pricing UNE elements at cost and on a nondiscriminatory basis as required by Sections 251 and 252 of the Act. *See* LCI Petition at 10. By charging CLEC competitors non-cost-based rates for UNEs, such as artificial "glue charges" to "combine" network elements into usable packages,⁴ the BOCs continue to exert monopoly power over the local network.

III. THE FAST TRACK PROPOSAL, IF ADOPTED WITH SAFEGUARDS, WILL HELP FOCUS BOC INCENTIVES ON PROVIDING NETWORK ELEMENTS TO CLECS IN A NONDISCRIMINATORY AND COMPETITIVE MANNER.

LCI's Fast Track option hones in on the root of the problem: the BOCs' "inherent conflict of interest." Even though Congress sought to craft the Act to balance the carrot of Section 271 interLATA entry with the prod of Section 251 interconnection and Section 271

⁴ Commissioner Powell suggests that BOC glue charges impede local competition by "pretending that there are actually ways to take [network] elements apart, hand them to an entrant, and have that entrant put them back together like pieces in a Lego play set." *See FCC Sees Progress Despite Nixing BellSouth S.C. Bid, Explores "Track B" Rebundling*, TELECOMPETITION REPORT, January 15, 1998.

competitive checklist compliance, a BOC has an inherent conflict of interest. Due to its integrated wholesale network/retail service operation, providing network elements on a nondiscriminatory, wholesale, basis to competitors under Sections 251 and 252 directly conflicts with a BOC's incentive to maximize retail business profits. By allowing a BOC to create the separate NetCo and ServeCo entities with different business plans, the Fast Track option focuses a BOC on being a "carrier's carrier" and providing network elements to all CLECs on a competitive basis through NetCo while providing service at the retail level through ServeCo.

LCI's proposal addresses the conflict of interest in integrated wholesale/retail operations of a BOC by allowing a BOC to volunteer to separate those operations into the independent NetCo and ServeCo subsidiaries, and requiring that these subsidiaries be subject to seven minimum and interrelated safeguards. If implemented correctly, these safeguards will serve to dampen potential conflicts between the NetCo/ServeCo operations:

1. NetCo and ServeCo will not share facilities, functions, services, employees or brand names;
2. NetCo will not engage in any retail marketing;
3. ServeCo will deal with NetCo on an equal (not "separate but equal") basis with other CLECs;
4. ServeCo must be substantially publicly-owned (approximately 40% or more);
5. ServeCo will maintain a separate board of directors, composed in part of representatives of the non-BOC ownership interests;
6. ServeCo's management will be compensated solely based on ServeCo's performance, not that of NetCo or the BOC; and

7. ServeCo will not provide stand-alone long distance services to NetCo local customers.

CWI agrees with LCI that successful fulfillment of all seven of these requirements, at a minimum, is necessary for the Fast Track system to work. Assuring that NetCo and ServeCo are truly separate ventures with independent management and fiduciary responsibilities is vital to resolve the BOC conflict of interest inherent in integrated wholesale-retail operations. A nominal restructuring, without these safeguards, will not sufficiently separate wholesale and retail operations to lessen the potential for self-dealing and anticompetitive discrimination between BOC wholesale network and retail service subsidiaries.

Arguably, a BOC that volunteers to create the NetCo subsidiary will have an incentive to act as a wholesale “carrier’s carrier,” as LCI states, and maximize its profits by provisioning network facilities and services to competing CLECs, and ServeCo alike, on attractive terms and conditions, and of a superior quality. As a separate wholesale business, NetCo would be focused on providing efficient operations support services and packaging unbundled network elements in competitor-friendly formats to CLECs. Ultimately, local telephone customers would benefit from the increased local competition.

CWI believes that the Fast Track approach in conjunction with the seven safeguards and Section 271 uniquely combine aspects of voluntary, incentive-based policy with structural regulation to align BOC profit incentives with developing local competition while potentially reining in BOC monopoly power. In the past, the Commission has introduced voluntary, incentive-based, systems such as price cap regulation to monitor the access services of dominant carriers while giving them freedom to respond to market forces. As LCI observes, the structural approach of its Fast Track proposal also follows current trends in regulation of the

electric utility industry, where the transmission facility and retail component of incumbent electric utilities have been separated into independent entities.

Furthermore, LCI's Fast Track proposal properly relies on the Telecommunications Act's framework. There are risks in a voluntary restructuring by the BOC, as envisioned by LCI. LCI's proposal does not propose complete divestiture and the BOC ultimately will still control both the NetCo and ServeCo subsidiaries. Given that the potential for anticompetitive conduct remains with Fast Track, therefore, it is appropriate that the LCI proposal does nothing to alter the BOCs' obligations under Sections 251 and 271 of the Act. The availability of this alternative does not remove the statutory prerequisites for interLATA entry. Instead, it merely provides a complementary approach to rebuttably presume compliance with the provisions.

IV. THE FCC SHOULD CONFIRM THAT A BOC OPTING FOR FAST TRACK 271 ENTRY CORRECTLY CONSTITUTES NETCO AND SERVECO.

One of the keys to success of a BOC voluntary Fast Track restructure is that the NetCo and ServeCo subsidiaries be "properly constituted" by the BOC, as LCI states, and remain that way. In particular, LCI's proposal is premised on the concept that, while NetCo and ServeCo will be sister subsidiaries of the BOC parent, a requirement that public ownership of a minority portion (at least 40 percent) of ServeCo's shares and election of independent directors of ServeCo with fiduciary responsibility to the public minority shareholders will provide a backstop against the BOC's control over ServeCo.

To assure that a Fast Track restructure is properly implemented, the FCC should make clear that no significant percentage (1 percent or more) of the 40 percent of the public shareholders of ServeCo can also directly or indirectly hold shares in the BOC parent or in the

NetCo sister affiliate. Furthermore, to assure an ongoing independent shareholder voice in ServeCo, the FCC should require that the BOC notify and obtain FCC approval prior to the transfer or assignment of any significant percentage (1 percent or more) of ServeCo shares to entities who own or control the BOC parent's stock or the NetCo affiliate's stock. The FCC has successfully implemented these types of ownership restrictions in the broadcast context.⁵ Furthermore, in the international arena, the FCC has imposed similar reporting requirements on U.S. international carriers contemplating joint ventures or affiliations with foreign carriers.⁶

V. THE FCC SHOULD MAKE CLEAR THAT THE FAST TRACK IS A REBUTTABLE PRESUMPTION AND DOES NOT REPLACE SECTION 271.

There are still many potential risks even if a BOC chooses to implement the Fast Track proposal successfully. Therefore, CWI believes that strict adherence to all seven of LCI's minimum safeguards is necessary. Furthermore, LCI's Fast Track option will complement rather than replace Sections 251 and 271. CWI believes that it is critical that the FCC remain independently vigilant in its application of existing Section 271 standards and procedures.

Moreover, if the Fast Track option is made available, the FCC must emphasize that the BOC voluntarily and successfully implementing it has established only the *rebuttable presumption* of 271 compliance. *See, e.g.*, LCI Petition at 51. In this regard, the FCC should make plain what standard will apply, if a party seeks to rebut the presumption. For instance, the FCC may identify that a party can rebut a BOC's Fast Track application if it shows that the BOC

⁵ For instance, in a new issue of broadcast TV company stock, the certificates commonly contain a legend notifying the purchaser that assignment or sale of the stock may be subject to restriction or approval under FCC alien ownership and local duopoly rules. *See, e.g.*, 47 C.F.R. § 73.3555.

⁶ *See, e.g.*, 47 C.F.R. § 63.11

improperly designed the NetCo or ServeCo subsidiary corporate structures. In addition, a showing that the BOC has failed to implement any of the seven safeguards associated with the Fast Track option would be sufficient to rebut the presumption.

VI. CONCLUSION

To the extent that LCI's Fast Track proposal will help expedite Congress's vision of the Section 251/271 process, CWI supports it. Without creative options such as the Fast Track, the promise of local competition can only continue to languish in the current miasma. Accordingly, CWI supports the development of LCI's Fast Track proposal along the lines identified in the Petition as modified herein. The combination of voluntary compliance and structural separation in the Fast Track proposal will help focus BOC incentives in line with the goal of local competition without weighing down the process with additional regulation. At the same time, the Fast Track proposal does not alter the statutory hurdle to BOC interLATA entry, and the Commission should remain vigilant in enforcing Section 271 of the Act to ensure that local competition fully develops.

Respectfully submitted,

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March 23, 1998

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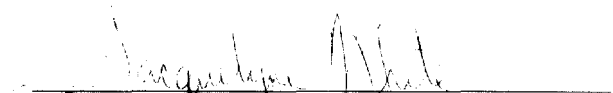
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CERTIFICATE OF SERVICE

I, Jacquelyne White, hereby certify that on this 23rd day of March 1998, I caused copies of the foregoing **"COMMENTS"** to be served via hand delivery upon those listed below.

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